

November 25, 1991

The Honorable Leonard P. Leong
Chairperson
State of Hawaii Environmental Council
220 South King Street, 4th Floor
Honolulu, Hawaii 96813

Dear Mr. Leong:

Re: Letters Setting Forth the Advice and Counsel of the
Attorney General

This is in reply to your memorandum to the Office of
Information Practices ("OIP") dated June 7, 1991 requesting an
advisory opinion regarding the above-referenced matter.

ISSUES PRESENTED

I. Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), government records containing communications between the Environmental Council ("Council") and the Department of the Attorney General must be made available for public inspection and copying.

II. To the extent that government records reflecting communications between the Council and the Department of the Attorney General are protected from disclosure under the UIPA, whether the Council may waive that protection and make the government records available for public inspection and duplication.

III. To the extent that government records reflecting communications between the Council and the Department of the Attorney General are protected from required disclosure under the UIPA, whether the public disclosure of a summary of those communications results in a waiver of such UIPA protection.

BRIEF ANSWERS

I. Under the UIPA, agencies must disclose "[g]overnment records which, pursuant to federal law or a statute of this State, are authorized to be disclosed to the person requesting access." Haw. Rev. Stat. . 92F-12(b)(2) and Act 167, . 1, 1991 Haw. Sess. Laws 437.

As the chief legal adviser to government agencies and officials, the Attorney General provides legal advice in two recorded forms. The Attorney General provides, in letter form, "advice and counsel," to certain public officers concerning their public duties. Additionally, the Attorney General issues "opinions." Section 28-3, Hawaii Revised Statutes, requires the Attorney General to file "opinions" on questions of law requested by certain public officers with the Office of the Lieutenant Governor, and requires that those opinions be made available for public inspection. Additionally, section 28-4, Hawaii Revised Statutes, provides that the Attorney General shall provide "advice and counsel" to certain public officers and, unlike section 28-3, Hawaii Revised Statutes, does not expressly require the advice to either be filed with the Lieutenant Governor or be made available for public inspection.

It is the position of the Attorney General that section 28-3, Hawaii Revised Statutes, only requires the public availability of opinions: (1) that are requested by certain public officers set forth in the statute, and (2) that are of such significant statewide importance that they guide the actions of government and, therefore, have been assigned an "opinion number." In addition, it is the position of the Attorney General that letters setting forth "advice and counsel" provided to a public officer under section 28-4, Hawaii Revised Statutes, are subject to the attorney-client privilege. Because the Attorney General is charged with the duty of administering sections 28-3 and 28-4, Hawaii Revised Statutes, and because an agency's construction of a statute it is charged with administering is given great weight, see Waikiki Resort Hotel v. City and County, 63 Haw. 222, 242-43, 624 P.2d 1553 (1981), we defer to the Attorney General's construction of this statute.

To the extent "advice and counsel" provided to an agency or official under section 28-4, Hawaii Revised Statutes, reflect communications between an agency and the Attorney General for the purpose of soliciting, obtaining, or receiving legal advice, within the meaning of Rule 503, Hawaii Rules of Evidence, chapter 626, Hawaii Revised Statutes, it is our opinion that under

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section 92F-13(3) and (4), Hawaii Revised Statutes, an agency is not required to make government records setting forth that advice and counsel available for public inspection and copying.

II. Yes. To the extent that the disclosure of a communication between the Council and the Department of the Attorney General would not result in a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised Statutes, the Council may elect to waive any privilege attaching to such communications. The Council, as client, is the holder of the attorney-client privilege and, thus, the entity ultimately entitled to decide whether to claim or waive it.

III. Yes. In our opinion, the Council's voluntary and knowing public disclosure of summaries of letters from the Attorney General setting forth advice and counsel operates as a waiver of the privilege attaching to those portions of those letters concerning the same subject matter as the letter summaries. A client cannot voluntarily and selectively disclose those portions of a communication between the client and the client's attorney without forfeiting the right to keep other portions of the communication on the same subject matter privileged. Where the Council has voluntarily disclosed summaries of letters setting forth legal advice and counsel of the Attorney General, we believe that it has waived the attorney-client privilege attaching to those portions of the letters concerning the same subject matter.

FACTS

Section 341-3, Hawaii Revised Statutes, recognizes the creation of an Office of Environmental Quality Control ("OEQC"), which is attached to the Department of Health for administrative purposes only. Those agencies and persons required to file environmental assessments and environmental impact statements under section 343-5, Hawaii Revised Statutes, do so with the OEQC. Under section 343-3, Hawaii Revised Statutes, all statements and other documents filed with the OEQC must be made available for public inspection, and the OEQC is directed to publish a bulletin, informing the public of notices filed by agencies that environmental impact statements are or are not required, the availability of the statements for review and comment, and of the acceptance or non-acceptance of the statements.

Section 341-3, Hawaii Revised Statutes, also recognizes the creation of an Environmental Council ("Council") consisting of fifteen members appointed by the Governor. Like the OEQC, the Council is attached to the Department of Health for administrative purposes only. Under section 341-6, Hawaii Revised Statutes, the Council is directed to serve as a liaison between the director of the OEQC and the public by soliciting information, complaints, opinions, recommendations, and advice concerning ecology and environmental quality through public hearings and other means. The Council is also directed to monitor the State's environmental goals and policies and publish an annual report with its recommendations for improvement.

In 1988, the Department of the Attorney General, in response to the Council's requests, provided the Council with legal advice, in the form of letters, which focused on the Council's power to issue declaratory rulings. The Council met, reviewed these letters, and chose to publish summaries of them in the publicly distributed OEQC bulletin referred to by section 343-3, Hawaii Revised Statutes.

Recently, the Council has received a request from a member of the public for copies of the Attorney General's letters to the Council which were summarized in the OEQC bulletin. In its memorandum to the OIP, the Council requested an opinion concerning: 1) whether letters to the Council from the Attorney General are covered by the attorney-client privilege, 2) whether the Council may permissibly waive and publicly disclose government records subject to the attorney-client privilege, and 3) whether the Council's public distribution of summaries of the Attorney General's letter advice operates as a waiver of the privilege attaching to such communications.

DISCUSSION

I. INTRODUCTION

The UIPA generally provides that "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. . 92F-11(b) (Supp. 1990). Additionally, however, as part of section 92F-12, Hawaii Revised Statutes, the Legislature set forth examples of government records, or information contained therein, that must be made available for public inspection and duplication "[a]ny provision to the contrary notwithstanding." Haw. Rev. Stat. . 92F-12 (Supp. 1990).

II. EFFECT OF SECTIONS 28-3 AND 28-4, HAWAII REVISED STATUTES

Among other things, section 92F-12(b), Hawaii Revised Statutes, requires agencies to disclose "[g]overnment records which, pursuant to federal law or a statute of this State, are expressly authorized to be disclosed to the person requesting access." Haw. Rev. Stat. . 92F-12(b)(2) (Supp. 1990) and Act 167, . 1, 1991 Haw. Sess. Laws 437. As a result, it is necessary for us to examine the provisions of sections 28-3 and 28-4, Hawaii Revised Statutes, which provide as follows:

.28-3 Gives opinions. The attorney general shall, when requested, give opinions upon questions of law submitted by the governor, the legislature, or its members, or the head of any department. The attorney general shall file a copy of each opinion with the lieutenant governor, the public archives, the supreme court library, and the legislative reference bureau within three days of the date it is issued. Opinions on file with the lieutenant governor, the public archives, and the supreme court library shall be available for public inspection

. . . .

.28-4 Advises public officers. [The attorney general] shall, without charge, at all times when called upon, give advice and counsel to the heads of departments, district judges, and other public officers, in all matters connected to their public duties, and otherwise aid and assist them in every way requisite to enable them to perform their duties faithfully.

Haw. Rev. Stat. . . 28-3 and 28-4 (1985 & Supp. 1990) (emphases added).

It is apparent from the above statutes that as the chief legal adviser to State agencies and officials, the Attorney General provides two separate and distinct recorded forms of legal advice: (1) "opinions" on questions of law submitted by certain public officers, and (2) "advice and counsel" to public officers in all matters connected to their public duties. Unlike section 28-3, Hawaii Revised Statutes, which expressly requires the public availability of certain specified "opinions," section 28-4, Hawaii Revised Statutes, does not expressly require that the "advice and counsel" of the Attorney General either be filed with the Lieutenant Governor or be made available for public inspection.

The provisions of section 28-3, Hawaii Revised Statutes, underscored above, were added by the First Legislature of the State of Hawaii. See An Act Approved May 23, 1961, ch. 98, 1961 Haw. Sess. Laws 73. The legislative history of section 28-3, Hawaii Revised Statutes, provides:

The purpose of this bill is to amend the existing section 30-3 of the Revised Laws of Hawaii 1955, relating to opinions of the attorney general to provide for the filing of a copy of each such opinion with the lieutenant governor. . . .

Your Committee has been informed that at the present time there is no place where a person can examine opinions of the attorney general very readily. That attorney general's opinions do furnish a basis for guiding the activities of government agencies and therefore should be readily accessible to the public.

. . .

H.R. Stand. Comm. Rep. No. 809, 1st Leg., 1961 Reg. Sess., Haw. H.J. 988 (1961) (emphases added).

According to the Department of the Attorney General, the Attorney General issues "opinions," as well as advice and counsel, in the form of written legal advice to various public officers and employees. Additionally, dating from the 1961 amendments to section 28-3, Hawaii Revised Statutes, it has been the position of the Department of the Attorney General that the opinions referred to by section 28-3, Hawaii Revised Statutes, are those opinions: 1) addressing questions of law submitted by the governor, the legislature, or the head of any department, and 2) that are of significant importance to the Judiciary, the Legislature, State agencies, and the public and, therefore, guide the actions of government agencies and officials. Opinions which satisfy these criteria are assigned an opinion number, filed with the Lieutenant Governor, and made available for public inspection. Conversely, it is the Attorney General's position that legal advice and counsel which is not of statewide significance, or which is not rendered to the persons described by section 28-3, Hawaii Revised Statutes, falls within the provisions of section 28-4, Hawaii Revised Statutes.

It is a cardinal rule of statutory construction that "where an administrative agency is charged with the responsibility of carrying out the mandate of a statute that contains words of broad and indefinite meaning, courts accord persuasive

weight to administrative construction and follow the same, unless the construction is palpably erroneous." Waikiki Resort Hotel v. City and County, 63 Haw. 222, 242-43, 624 P.2d 1553 (1981).

While the scope of section 28-3, Hawaii Revised Statutes, is not free of doubt, we believe that the Attorney General's construction of section 28-3, Hawaii Revised Statutes, is consistent with the statute's legislative history which indicates that its purpose was to make "opinions" that guide the activities of government available for inspection. Additionally, we cannot ignore the fact that for nearly thirty years, the Attorney General's longstanding interpretation of section 28-3, Hawaii Revised Statutes, has not been challenged.

In light of these facts, we conclude that section 28-3, Hawaii Revised Statutes, only requires the public availability of: (1) opinions on questions of law, requested by certain public officers such as the governor, the legislature, or a department head; and (2) which are of such statewide significance that they guide the actions of agencies and, therefore, have been assigned an opinion number by the Department of the Attorney General. We further conclude that section 28-4, Hawaii Revised Statutes, does not expressly require the Attorney General's "advice and counsel" to public officers be available for public inspection.

We now turn to a consideration of whether one of the exceptions to public access set forth at section 92F-13, Hawaii Revised Statutes, protects the Attorney General's "advice and counsel" under section 28-4, Hawaii Revised Statutes, from required public disclosure.

III. UIPA TREATMENT OF GOVERNMENT RECORDS COVERED BY ATTORNEY-CLIENT PRIVILEGE

Section 92F-13, Hawaii Revised Statutes, provides in pertinent part:

. 92F-13 Government records; exceptions to general rule. This chapter shall not require disclosure of:

. . . .

(3) Government records that, by their nature, must be confidential in order for the

government to avoid the frustration of a legitimate government function;

- (4) Government records which, pursuant to state or federal law, including an order of any state or federal court, are protected from disclosure;

Haw. Rev. Stat. . 92F-13(3) and (4) (Supp. 1990).

The attorney-client privilege was developed to promote full and complete freedom of consultation between clients and their legal advisors without fear of compelled disclosure, except with the client's consent. See generally, Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 1-4 (2d ed. 1989). The privilege is applicable to communications from the attorney to the client, as well as communications to the attorney from the client. Schwimmer v. United States, 232 F.2d 855 (8th Cir. 1956); Costal States Gas. Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980).

This privilege is also unquestionably applicable to the relationship between government attorneys and government agencies and administrative personnel. Green v. IRS, 556 F. Supp. 79 (N.D. Ind. 1982); see also Rule 503(a)(1), Hawaii Rules of Evidence (client includes "public officer" or "other organization or entity, either public or private"). The protection of communications made in confidence between an attorney and a governmental client serves an important public policy purpose. As stated by an Ohio court:

In disclosing these records, attorneys and their governmental clients may feel compelled to revert to unrecorded oral communications in order to protect their communications from possible public disclosure. The government unit would become less efficient due to the increased chance of miscommunication. Public policy favors an institution being able to freely seek legal advice and for advice to be given in a document form without concerns over a breach of the privilege by public disclosure.

Woodman v. City of Lakewood, 541 N.E.2d 1084, 1087 (Ohio 1988) (emphasis added).

It is our opinion that the advice and counsel provided by the Attorney General described by section 28-4, Hawaii Revised Statutes, satisfies the elements of the attorney-client

privilege set forth by Rule 503, Hawaii Rules of Evidence, chapter 626, Hawaii Revised Statutes, and, therefore, may be withheld from public inspection and copying by the Council under section 92F-13(3) and (4), Hawaii Revised Statutes. See OIP Op. Ltr. No. 89-10 at p. 5 (Dec. 12, 1989).

Under Rule 503, a client, which includes the Council, has a privilege to refuse to disclose confidential communications made for the purpose of facilitating the rendition of profession legal services to the client. In our opinion, communications within the scope of this rule of evidence are protected from disclosure pursuant to state law within the meaning of section 92F-13(4), Hawaii Revised Statutes. Similarly, the legislative history of section 92F-13(3), Hawaii Revised Statutes, indicates that among other things, agencies may withhold from public inspection and duplication, "[i]nformation that is expressly made nondisclosable or confidential under Federal or State law or protected by judicial rule." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

In addition, in some cases, communications between the Council and the Department of the Attorney General will be protected from public disclosure under section 92F-13(2), Hawaii Revised Statutes, which permits agencies to withhold "[g]overnment records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State . . . is or may be a party, to the extent that such records would not be discoverable." This is because under Rule 26(b)(1), Hawaii Rules of Civil Procedure, discovery is permitted of "any matter not privileged."

We now turn to an examination of whether the the Council may elect to waive the attorney-client privilege attaching to the Attorney General's advice and counsel, and whether the publication of summaries of letters that set forth the Attorney General's advice and counsel operates as a waiver of the attorney-client privilege.

IV. WAIVER OF ATTORNEY-CLIENT PRIVILEGE

The protection of the attorney-client privilege, like other privileges, may be waived or relinquished. The client is the holder of the attorney-client privilege and, thus, the person ultimately entitled to decide whether to claim or waive it. See Epstein, The Attorney-Client Privilege and the Work-Product Doctrine at 60 (2d ed. 1988).

The privilege may be said to be waived when the client relinquishes its protection. The waiver of this privilege follows as a consequence from any conduct by the client that would make it unfair for the client thereafter to assert the privilege. See generally, Marcus, The Perils of Privilege: Waiver and the Litigator, 84 Mich. L. Rev. 1065 (1986).

Our research has not disclosed any Hawaii appellate court decisions specifically addressing a client's waiver of the attorney-client privilege. However, other authorities have concluded that a party cannot voluntarily and selectively disclose those portions of communications between the party and the party's attorney that suit its version of events without forfeiting the right to keep other communications on the same subject matter privileged. As stated by the Fourth Circuit Court of Appeals:

Nor is the loss of the privilege confined to 'the particular words used to express the communication's content' but extends 'to the substance of the communication,' since the disclosure of 'any significant part' of a communication waives the privilege and requires the attorney to disclose 'the details underlying the data which was to be published.'

In Re Grand Jury Proceedings, 727 F.2d 1352, 1356 (1984) quoting United States v. Cote, 456 F.2d 142, 144 (8th Cir. 1972).

Similarly, under Rule 510 of the Uniform Rules of Evidence, the holder of a privilege waives it if the privilege holder consents to the disclosure of "any significant part of the privileged matter." [Emphasis added.]

Exemption 5 of the federal Freedom of Information Act, 5 U.S.C. . 552(b)(5) (1990), also permits agencies to withhold agency records covered by privileges recognized at common law, such as the deliberative process and attorney-client privileges. Federal courts have held that the voluntary disclosure of documents covered by Exemption 5 operates as a waiver of Exemption 5 protection. See Mead Data Central, Inc. v. United States Dep't of the Air Force, 581 F.2d 242, 253 (8th Cir. 1978). Under FOIA's Exemption 5, "the scope of any waiver is defined by, and co-extensive with, the breadth of the prior disclosure." Nissen Foods. Co. v. NLRB, 540 F. Supp. 584, 586 (E.D. Pa. 1982).

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The decision in Washington Post Co. v. U.S. Dep't of the Air Force, 617 F. Supp. 602 (D.D.C. 1985), is of relevance to our analysis of the question presented. In the Washington Post case, the court considered whether the voluntary publication of an executive summary of an agency report covered by the deliberative process privilege of Exemption 5 operated as a waiver of FOIA protection. The court held that the Air Force's publication of an executive summary of the report operated as a waiver of Exemption 5 protection, over the objection of the Air Force that such a conclusion would force executive agencies to become more cautious in what information they disclose.

The most recent federal court decision involving the waiver of Exemption 5 protection is Shell Oil Company v. IRS, 772 F. Supp. 202 (D. Del. 1991). In the Shell Oil case, the government contended that the oral disclosure of a document protected by FOIA's Exemption 5 did not waive the deliberative process privilege because only the release of the actual document results in a waiver. The court rejected the government's argument, reasoning:

The bald argument that no waiver should be found unless a physical copy of disclosed information has been released is a weak one. . . .

We hold that waiver of the deliberative process privilege does not depend on receipt of a physical copy of the disclosed information. A public reading of the document is sufficient.

Shell Oil Company, 772 F. Supp. at 209.

Based upon the above authorities we conclude that the Council voluntarily and knowingly elected to publicize summaries of letters setting forth the advice and counsel of the Attorney General, and that such publication has resulted in a voluntary waiver of the attorney-client privilege attaching to other portions of those letters on the same subject matter.

However, our conclusion does not mean that other communications leading to the Attorney General's advice and counsel set forth in letters to the Council have lost the protection of the attorney-client privilege. See Buford v. Holladay, 133 F.R.D. (S.D. Miss. 1990) (publication of attorney general opinion does not operate as a waiver of the privilege attaching to communications that took place before the issuance of the opinion). Lastly, to the extent that the Attorney General's letters to the Council cover subjects not disclosed in the opinion summaries

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published by the Council, it is our opinion that the attorney-client privilege continues to attach to those portions of those letters.

CONCLUSION

We conclude that sections 28-3, 28-4, and 92F-12(b)(2), Hawaii Revised Statutes, only require the public availability of Attorney General opinions on questions of law which are requested by the governor, the legislature, or the head of any department and that are of significant statewide significance such that the Attorney General has assigned them an opinion number. We further conclude that "advice and counsel" provided by the Attorney General under section 28-4, Hawaii Revised Statutes, is subject to the attorney-client privilege and protected from required agency disclosure under the UIPA.

For the reasons set forth above, we conclude that the Council's voluntary and knowing publication of summaries of letters setting forth the Attorney General's advice and counsel operates as a waiver of the attorney client-privilege for those portions of the letters which concern the same subject matter as the letter summaries.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

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